

***United States Court of Appeals
for the Second Circuit***

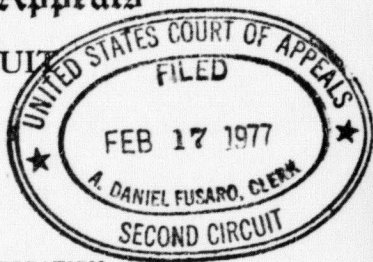


JOINT APPENDIX

77-6005

In the
United States Court of Appeals
FOR THE SECOND CIRCUIT

DOCKET NO. 77-6005



SECURITIES INVESTOR PROTECTION CORPORATION,
Applicant,

vs.

EXECUTIVE SECURITIES CORPORATION,
Defendant.

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

vs.

EXECUTIVE SECURITIES CORPORATION, ET AL.,
Defendants,
SHEARSON HAYDEN STONE, INC., AND YALE UNIVERSITY,
Claimant-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

JOINT APPENDIX

See Inside Cover for Names of Attorneys

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RELEVANT DOCKET ENTRIES

Date	Proceedings
1975	
02-14	Filed complaint and issued summons.
02-14	Filed Applicant's application.
02-14	Filed CONSENT ORDER. Ordered that Cameron F. MacRae, II, Esq. is appointed Trustee for liquidation of business of Executive Securities Corporation, etc. Said Trustee shall file a fidelity bond in amt. of \$20,000, etc. Tenney. JUDGMENT ENTERED. Clk (mn) Ent.
02-26	Filed ORDER trustee be authorized to pay administrative expenses in connection with liquidation of business etc.; all matters arising in this proceeding except such matters are expressly reserved to the Judge, be referred to Hon. John J. Galgay, Bankruptcy Judge to hear and determine, etc. Tenney, J. (mn)
09-02	Filed Memorandum of the Securities Investor Protection Corporation in Support of Trustee's Determination Concerning Claims, etc. from SIPC, Wash. D.C.

Date	Proceedings
1976	
06-09	Filed Claimant Shearson Hayden Stone Inc. Notice of Appeal to District Court.
06-09	Filed Appellant Shearson Hayden Stone Inc. Designation of Contents of Record and Statement of Issue.
06-09	Filed Appellee Cameron F. MacRae III, Trustee Designation of Contents of Record.
06-28	Filed Stip & Order for enlargement of time within which to file briefs in connection with appeals of claimants Yale University & Shearson Hayden Stone Inc. to 7-9-76, appellees have until 7-30-76 to serve & file briefs. Tenney, J.
07-14	Filed Memorandum of Law of Shearson Hayden Stone Inc. in support of its appeal from an Opinion and Order of Bankruptcy Court Affirming Trustee's determination.
07-09	Filed Brief for Claimant-Appellant Yale University.
07-30	Filed Brief for Appellee Cameron F. MacRae III, Trustee for Liquidation of Exec. Sec. Com.

Date	Proceedings
1976	
08-04	Filed SIPC Memorandum of Securities Investor Protection Corporation.
08-06	Filed Claimant Appellant Yale University Claim.
09-27	Filed Stip & Order as to scheduling of oral argument for Tues. 11-1-76, 2:00 p.m. Tenney, J.
11-29	Filed OPINION #45401. Determination of Bankruptcy Court is affirmed. So Ordered. Tenney, J. (mn)
12-29	Filed Notice of appeal by Shearson Hayden & Yale Univ. claimants from the order dated 11-29-76 to the U.S.C.A. Copy to all parties.
1977	
01-06	Filed notice of appeal by Yale Univ. Claimant from the order dated 11-29-76 to the U.S.C.A. Copy to all parties.
01-06	Filed Bond for costs on appeal by Yale Univ.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,
SECURITIES INVESTOR PROTECTION
CORPORATION,
Applicant
—against—
EXECUTIVE SECURITIES CORPORATION,
Defendant

No. 75 Civ. 733
(SIPC)

OPINION

JOHN J. GALGAY — *Bankruptcy Judge*

This is a proceeding pursuant to the Securities Investor Protection Act of 1970 (The 1970 Act), 15 U.S.C. § 78aaa *et seq.* Upon application of the Securities Investor Protection Corporation ("SIPC"), Judge Tenney determined on February 14, 1975, that the customers of Executive Securities Corporation ("Executive") were in need of protection under the 1970 Act, and Cameron F. MacRae III was appointed Trustee for the liquidation of the business of Executive.

Seven institutions that lent securities to Executive filed claims in this proceeding. On June 12, 1975, the Trustee notified these lenders of his determination that they were not "customers" as defined in the 1970 Act, stating that they would be treated as general creditors of Executive.

Four of the lenders, Yale University ("Yale"), Dean Witter, Johns Hopkins University ("Johns Hopkins") and Shearson Hayden Stone, Inc. ("Shearson") opposed the Trustee's determination and filed statements in opposition thereto. They are collectively referred to hereinafter as "Claimants."

A hearing was held on September 9, 1975, at which time all Claimants were afforded an opportunity to be heard, prior to which briefs were filed by the Trustee, SIPC and Yale.

The Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I. Relationships of Claimants to Executive

The following facts are undisputed:

1. Yale had a written agreement with Executive governing its loan of securities to Executive, which was called a "Security Loan Agreement." Shearson and Dean Witter has oral agreements with Executive governing the loans of securities; the Record does not disclose whether Johns Hopkins' agreement was written or oral. All agree that the Shearson, Dean Witter and Johns Hopkins agreements did not vary in any respect here material from the terms of Yale's agreement.

2. Under the terms of their agreements with Executive, Claimants lent securities to Executive; in return Executive gave Claimants as "collateral" an amount of money equal to 100%

of the market value of the loaned securities.¹ No interest was paid. The loans could be terminated on short notice by either party.

3. Each party to the loans had a right to "mark to market"; that is, upon one day's notice, Claimants could demand additional cash collateral to the extent that the loaned securities increased in value, and Executive could demand a return of cash collateral to the extent that the loaned securities decreased in value.

4. Transactions of this sort enable lenders such as Claimants to increase their income by investing the cash collateral received from the broker in other income-producing investments. From the broker's point of view, transactions of this sort enable it to obtain securities that it needs to meet various commitments, such as delivery commitments in connection with short sales of its customers, and to obtain securities that it

¹ The amounts claimed by each Claimant are as follows, measured as the alleged difference between the collateral maintained by each Claimant and the value of the unreturned securities as of the date the Trustee was appointed:

Yale:	\$ 66,700
Dean Witter:	\$148,000
Johns Hopkins:	\$ 21,625
Shearson:	\$ 38,000

Three lenders did not oppose the Trustee's determination. These lenders, and the approximate amounts of their claims, are as follows: Kidder Peabody & Co., Inc. (\$193,000), Loewi & Company, Inc. (\$22,000), and Stifel Nicklaus & Co., Inc. (\$240).

needs when its customers fail to make timely delivery of securities which they have sold.

5. Yale and Johns Hopkins lent securities from their investment portfolios. Dean Witter and Shearson loaned on their own behalf securities pledged to them by their customers under margin hypothecation agreements. Each of the Claimants was free to use the collateral received from Executive for its own benefit.

6. None of the Claimants maintained a securities account with Executive. Executive did not act as broker in connection with Claimants' purchases of any of the securities that they loaned to Executive (nor at any other time).

CONCLUSIONS OF LAW

This Court must decide whether persons who lend securities to a broker-dealer, and receive in return full cash collateral for those securities, with right to "mark to market", are entitled to "customer" status under the 1970 Act, despite the fact that their loans were not made from accounts with the broker-dealer through which investment or trading in securities took place. After review of the statutory provisions and relevant case law I have decided Claimants are not entitled to "customer" status under SIPC, and must take their place alongside Executive's other general creditors.

In *S.E.C. v. F. O. Baroff, Inc.*, 497 F.2d 280 (2d Cir. 1974), the question arose as to whether someone loaning securities to a brokerage house was a "customer" under the SIPC statute. The loan was apparently made without any consideration; the Second Circuit found the record to be barren of positive proof

as to the lender's motive. 497 F.2d at 281. Five weeks later the brokerage house was placed under protection of the District Court. Judge Davis, speaking for unanimous panel, held that despite the language of § 6(c)(2)(A)(ii), Congress did not intend someone in such a position to be treated as a customer.

The Court, seeking guidance in the House Report accompanying the bill, found that "customer" was meant to be used synonymously with "investor." 497 F.2d at 283. The Court characterized the relationship between the two actors as debtor-creditor in a general sense, not in the specialized way in which a brokerage house and its customers achieve such a relationship. Since the intent of Congress was to protect only *investors* and not creditors in general, the Court held the lender in *Baroff* fell outside of SIPC's protection. This view was just recently re-affirmed by the Second Circuit in *S.E.C. v Morgan, Kennedy & Co.*, Docket 75-6066 (2d Cir. Jan. 23, 1976).

Here the relationship between the named parties is even clearer. Yale and Executive had a signed loan agreement whereby Yale received a check equal to the value of the loaned securities. By the "mark to market" provision Yale could demand further collateral from Executive if the value of the loaned securities increased. Conversely, if the value of the stocks decreased Yale had an obligation to return funds to Executive upon demand.

Yale is only a creditor of Executive by reason of its lack of diligence in "marking to the market." Yale's losses have nothing to do with its customer relationship with Executive. Indeed, Yale did not even have an account with Executive as of the time of Executive's demise.

Yale was not an investor doing business through Executive. It loaned money in the form of stock in return for collateral which it then invested in hope of profit. Its relationship with Executive was that of banker, not customer. Accordingly, the trustee's determination that Yale is not a customer of Executive within the meaning of § 6(c)(2)(A)(ii) must be affirmed. And since none of the other claimants had agreements, whether oral or written, which disagreed in any material respect from Yale's agreement with Executive, the trustee's determination in those cases must be affirmed as well.

SO ORDERED

s/ JOHN J. GALGAY
Bankruptcy Judge

Dated: New York, New York
February 23, 1976.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Filed Nov. 29, 1976

SECURITIES INVESTOR PROTECTION
CORPORATION,

Applicant

—against—

EXECUTIVE SECURITIES CORPORATION,

Defendant

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

—against—

EXECUTIVE SECURITIES CORPORATION,

ET AL.,

Defendants.

75 Civ. 733

(CHT)

MEMORANDUM

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TENNEY, J.

This is an appeal from the order of the Honorable John J. Galgay, Bankruptcy Judge, dated February 23 and filed February 24, 1976, jurisdiction in this Court being based on Section 39c of the Bankruptcy Act, 11 U.S.C. § 67(c) and Part VIII of the Bankruptcy Rules. The issue presented is whether Shearson Hayden Stone, Inc. and Yale University (referred to collectively herein as "claimants") are "customers" of Executive Securities Corporation ("Executive") within the meaning of the Securities Investor Protection Act of 1970 ("SIPA"), 15 U.S.C. §§ 78aaa *et seq.*, and therefore entitled to the preferential treatment afforded to "customers" thereunder, or whether they are instead to be treated as general creditors of Executive.

The Bankruptcy Court made the following findings. Claimants, neither of whom maintained an account with Executive, were lenders of securities to Executive. In return, they re-

ceived cash "collateral" equal to 100 percent of the market value of the securities on the day the securities were lent. The securities lent had not been purchased through Executive. Yale's loan was pursuant to a written agreement with Executive, called a "Security Loan Agreement"; Shearson's loan was pursuant to an oral agreement which did not vary in any material respect from the terms of Yale's agreement.

Transactions of this sort enable lenders such as claimants to increase their income by investing the cash collateral received from the broker in other income-producing investments (while at the same time the lender continues to receive payments from the broker equal to the dividends and any other distributions declared with respect to the loaned securities) (paragraph 5 of the Yale agreement). The benefit the lender hopes to derive is thus based on some later transaction concerning the cash which may not even involve the securities markets. From the point of view of a broker such as Executive, transactions of this sort enable it to obtain securities that it needs to meet various commitments, including covering short sales by its customers and fulfilling delivery commitments when its customers fail to make timely delivery of securities which they have sold.

No interest was paid under the agreements, and the loans could be terminated upon short notice by either party. Each party to the loans had the right to "mark to market"; that is, upon one day's notice, claimants could demand additional cash collateral to the extent that the loaned securities increased in value, and Executive could demand a return of the cash collateral to the extent that the loan securities decreased in value. Claimants were therefore entitled to 100 percent collateral on their loans of securities, and, as Judge Galgay recognized, any

loss they ultimately suffered relates to their failure to monitor the value of the loaned securities and insist upon additional cash collateral.

Claimants had the right under their agreements to treat the loan as terminated in the event that proceedings were commenced by or against the borrower under, *inter alia*, SIPA (paragraph 4 of the Yale agreement). Claimants could then treat the loaned securities as having been purchased by the borrower and could retain out of the collateral an amount equal to the last sales price of the securities prior to the commencement of such proceedings (paragraph 4 of the Yale agreement).

Yale claims that Executive owes it \$66,700 — the difference between the \$200,000 collateral it retained and the \$266,700 value of the securities it loaned, as computed by Yale as of February 14, 1975 when liquidation proceedings were commenced against Executive. Shearson claims \$38,000 in connection with its loans.

In the order appealed from, Judge Galgay held that claimants' loans were not entitled to the protection given to "customer" claims under SIPA because the loans were not incidental to an existing investment or trading account with Executive. In so holding he relied principally on the opinion of the United States Court of Appeals for the Second Circuit in *SEC v. F.O. Baroff Co., Inc.*, 497 F.2d 280 (2d Cir. 1974), in which, after analyzing the legislative history of SIPA, the court held that a lender of stock was not entitled to "customer" protection where the loan was not made in connection with investment or trading activity with the broker. Judge Galgay explained that "[h]ere the relationship between the named parties is even clearer" since, unlike the *Baroff* claimant, claim-

ants did not invest or trade in securities through Executive and did not even have an account with Executive. (Opinion of Judge Galgay dated Feb. 23, 1976, at 6-7.) Accordingly, he affirmed the trustee's determination that claimants were to be treated as general creditors of Executive and not as "customers" within the meaning of SIPA. *Id.* at 7-8.

Examination of the cases interpreting SIPA and its legislative history, the text of SIPA and Section 60e of the Bankruptcy Act, 11 U.S.C. § 96(e), from which it was derived, each confirms the correctness of Judge Galgay's conclusion that persons such as claimants are not "customers" of Executive within the meaning of SIPA.

The circumstances leading to creation of the Securities Investor Protection Corporation ("SIPC") by SIPA were recently described by the United States Supreme Court as follows:

"Following a period of great expansion in the 1960's, the securities industry experienced a business contraction that lead to the failure or instability of a significant number of brokerage firms. Customers of failed firms found their cash and securities on deposit either dissipated or tied up in lengthy bankruptcy proceedings. In addition to its disastrous effects on customer assets and investor confidence, this situation also threatened a 'domino effect' involving otherwise solvent brokers that had substantial open transactions with firms that failed. Congress enacted the SIPA to arrest this process, restore investor confidence in the capital markets, and upgrade the financial responsibility requirements for registered brokers and dealers. S. Rep. No. 91-1218, pp. 2-4 (1970); H.R. Rep. No. 91-1613, pp. 2-4 (1970)." *SIPC v. Barbour*, 421 U.S. 412, 415 (1975).

Specifically, SIPA was enacted to provide special protection for "customers" of a failed broker-dealer by allowing them to receive preference over general creditors and allowing their claims to be satisfied to a limited extent by funds advanced by SIPC, if assets in the "single and separate fund" were insufficient.

The definition of the word "customers" upon which the determination herein was based is found in Section 6(c)(2)(A)(ii) of SIPA, 15 U.S.C. § 78fff(c)(2)(A)(ii). It defines "customers" as follows:

"persons (including persons with whom the debtor deals as principal or agent) who have claims on account of securities *received, acquired, or held by the debtor from or for the account of such persons* (I) for safekeeping, or (II) with a view to sale, or (III) to cover consummated sales, or (IV) pursuant to purchases, or (V) as collateral security, or (VI) *by way of loans of securities by such persons to the debtor*, and shall include persons who have claims against the debtor arising out of sales or conversions of such securities, and shall include any person who has deposited cash with the debtor for the purpose of purchasing securities, but shall not include any person to the extent that such person has a claim for property which by contract, agreement, or understanding, or by operation of law, is part of the capital of the debtor or is subordinated to the claims of creditors of the debtor." (Emphasis supplied).

The application of this definition to securities lenders was recently addressed by the United States Court of Appeals for the Second Circuit in an opinion relied on by Judge Galgay, as hereinbefore noted, which opinion considered the circumstances under which persons who lend securities to a broker-dealer are "customers" of the broker-dealer within the meaning

of SIPA. *SEC v. F. O. Baroff Co., Inc.*, *supra* 497 F.2d 280. The claimant in *Baroff*, Mr. Lubin, loaned 7,000 shares of the common stock of Electronic Transistor Corp. to the broker-dealer. The broker-dealer opened an account in Mr. Lubin's name in which the transaction was reflected and issued a receipt to him memorializing delivery. Mr. Lubin authorized the broker-dealer to use the securities as collateral for the broker-dealer's own loans and did not give the securities to the broker-dealer in connection with his own participation in the securities markets. About five weeks after the transaction, proceedings were commenced for the liquidation of the broker-dealer under SIPA. Mr. Lubin argued that since he had made a loan of securities (which had been reflected in his account), he came within the language of SIPA and was entitled to its protection. Although the court recognized that "[i]n the literal sense, that is what happened," that fact was not deemed sufficient or dispositive. *Id.* at 282.

The court analyzed the legislative history of SIPA and concluded that only loans made by a customer in connection with trading through the broker being liquidated were meant to be protected as "customer" loans to that broker under that Act. *Id.* at 282-83. It noted that the House Report on the bill stated the bill's main purpose as protection of persons who deal in securities through a broker when that broker faces financial difficulties, and pointed out that the testimony on the bill corroborated the conclusion that it was the *trading customer* who was to be protected by SIPA. *Id.* at 283. The court further observed that "[t]here was no actual or likely use of the shares as collateral for margin purposes by Lubin of other securities . . . [T]here was no reasonable expectation that the shares would be sold for Lubin's account in the near future." *Id.* at

284. The court then concluded that Mr. Lubin's loan did not have "the indicia of the fiduciary relationship between a broker and his public customer, but rather [had] the characteristics of, at most, an ordinary debtor-creditor relationship." *Id.*¹ Accordingly, the court held that

"Because [Mr. Lubin's] loan to the broker-debtor had no connection with his trading activity in the securities market, he cannot qualify by virtue thereof as a 'customer' entitled to the benefits of the Securities Investor Protection Act." *Id.*

Claimant Yale's brief advances two grounds for distinguishing the *Baroff* case. First, it argues that claimants' loans were related to their investment in the securities market because they received collateral in return for their loans, whereas the lender in *Baroff* did not receive consideration for his loan. (Yale's Brief at 36-37.) But the mere receipt of money in return for the use of securities does not provide the requisite connection between the loan of securities and trading activity. Claimants purchased securities elsewhere before loaning them to Executive; their claims fail, *not* because they are not *investors* in the securities market, but because their securities were not lent in connection with trading or investment *through Executive*.

Claimant Yale's second ground for distinguishing the *Baroff* case is that because the lender in *Baroff* did not receive consideration for the loan, he made a contribution to capital, a transaction which is specifically excluded from SIPA's definition of "customer." *Id.* at 35. The court in *Baroff*, however, considered that argument and refused to base its holdings upon it. *Baroff, supra*, 497 F.2d at 284. Thus, this distinction is without merit.

Claimants further suggest that their transactions fall squarely within the transactions listed in Section 6(c)(2)(A)(ii) of SIPA, 15 U.S.C. § 78fff(c)(2)(A)(ii), claiming that such provisions must be read literally. The Second Circuit rejected any such literal reading in *Baroff*. Indeed, even were SIPA read literally, a "customer" is clearly limited to persons who maintain accounts with a broker-dealer and who trade or invest through them.² Claimants had no account with Executive and clearly do not come within SIPA's definition of the word "customer." Nor would claimants have been protected by opening a nominal trading account, unless the loan was in connection with that account. As indicated above, the claimant in *Baroff* did have an account with the debtor, although it was not a "live" account at the time of the loan. However, what claimants might have done has no bearing on the issue; they did not in fact have accounts with Executive.

Finally, claimant Yale makes reference to the legislative history of Section 60e of the Bankruptcy Act, 11 U.S.C. § 96(e), since SIPA's definition of "customer" was taken virtually verbatim from the definition contained in Section 60e. However, there is nothing in the legislative or legal history of Section 60e that suggests that it was intended to do more than eliminate the inequities among cash and margin customers arising from conflicting treatment in different jurisdictions and to provide protection to such customers who made loans of securities to brokers in connection with their participation in the securities markets and out of their trading accounts. There is nothing to suggest that Congress was concerned with broadening the protection that parties to secured loan agreements, such as those involved herein, would receive. Nor are there persuasive policy reasons to give special protection to securities lenders

such as claimants. Indeed, they already enjoy greater protection than normal secured creditors, not only because their collateral is fully liquid cash, but also because of their right to demand additional cash collateral in the case of market increases.

The determination of the Bankruptcy Court is affirmed.

So ordered.

Dated: New York, New York

November 29, 1976

CHARLES H. TENNEY
U.S.D.J.

FOOTNOTES

¹ The meaning of "customer" as used in SIPA was recently addressed by the Court of Appeals for the Second Circuit in *SIPC v. Morgan, Kennedy & Co., Inc.*, 533 F.2d 1314 (2d Cir. 1976). There the court reviewed its decision in *Baroff* and, noting that "[e]mphasis on the customer as investor and purchaser/trader has been a consistent theme in cases in this Circuit," *id.* at 1317, held that in spite of the fact that the Reading Body Works, Inc. Trust was a customer of Morgan, Kennedy & Co., Inc., the individual beneficiaries of the Trust were not customers of Morgan, Kennedy (and thus were not each entitled to the maximum reimbursement from the SIPC Fund). Although the *Morgan, Kennedy* opinion does not bear directly on the status of a stock lender, it reaffirms the meaning of "customer" as one who trades or invests in securities through the failed broker-dealer.

In another bankruptcy proceeding, *SEC v. Howard Lawrence & Co., Inc.*, 74 Civ. 193, (S.D.N.Y. Feb. 14, 1975), Judge Galgay considered the claim of Mr. Ralph Smith, who had loaned securities to a failed broker-dealer in order to enable it to meet a commitment to another customer. Mr. Smith maintained an active trading account with the broker-dealer. The court recognized the applicability of the principles enunciated in the *Baroff* decision and affirmed the Trustee's rejection of the claim: "We have discarded the literal interpretation of the word 'customers' to conform to the general policy of the Act. Mr. Smith, in order to be protected, must have made the loan pursuant to his position as an investor in securities." *Id.*

Other decisions dealing with different aspects of SIPA have also recognized that the act was intended to protect customers who *traded* through the failing broker. *SEC v. Packer, Wilbur & Co., Inc.* 498 F.2d 978 (2d Cir. 1974); *SEC v. Aberdeen Securities Co., Inc.*, 480 F.2d 1121 (3d Cir.), *cert. denied*, 414 U.S. 1111 (1973).

² Section 6(c)(2)(A)(ii) states in pertinent part:

"(ii) 'customers' of a debtor means persons . . . who have claims on account of securities received, acquired, or held by the debtor *from or for the account* of such persons . . . (VI) by way of loans of securities by such persons to the debtor. . . ." (Emphasis supplied).

YALE UNIVERSITY EXHIBIT 1
SECURITY LOAN AGREEMENT

AGREEMENT made this 15th day of October, 1974 by and between Executive Securities Corp. a Florida corporation, having an office at 25 Broadway, New York, New York 10004 (the "Borrower") and Yale University, New Haven, Connecticut ("Yale"),

WITNESSETH

WHEREAS, the Borrower wishes to borrow certain securities from Yale, and Yale is willing to lend such securities to the Borrower, all on the terms and conditions set forth herein,

NOW, THEREFORE, in consideration of the mutual promises and covenants herein contained, the parties hereto agree as follows:

1. *Loan of Securities.* Yale in its sole discretion, from time to time, may lend securities to the Borrower at the Borrower's request. In the event Yale decides to make such a loan, it shall deliver to the Borrower certificates representing the securities loaned together with duly executed stock transfer powers, and shall list the securities on a schedule and receipt, a form of which is attached hereto as Appendix A, which Borrower shall execute when the scheduled securities are received. Yale represents that, as to any securities so delivered, it shall have, at the time of delivery, no present intention to sell the same. Yale and the Borrower agree that no such loan or delivery shall be construed to constitute a purchase or sale of the securities so loaned and delivered.

2. *Collateral.* On receipt of the loaned securities, the Borrower shall deliver to Yale a certified or bank cashier's check payable to Yale or its nominee, as Yale designates, drawn on New York Clearing House funds, in an amount equal to at least 100% of the market value of the loaned securities, on the basis of the last sales price prior to the time of delivery of said securities on the exchange on which they are traded or as otherwise agreed. The Lender shall acknowledge receipt of said check by executing a receipt in the form attached hereto as Appendix A. The funds deposited by the Borrower with the Lender as the same may hereafter be adjusted pursuant to Paragraph 6 are herein referred to as the collateral for the loaned securities. It is understood that Yale may make unrestricted use of any collateral in its possession and may retain any income or profits and bear all losses therefrom.

3. *Termination of the Loan.* A loan of securities may be terminated by the Borrower upon twenty-four hours notice to Yale. A loan of securities may be terminated at any time by Yale upon five business days prior notice to the Borrower. The Borrower shall, on or before such termination date, deliver to Yale certificates for the loaned securities, with duly executed stock transfer powers attached, endorsed to Yale, its nominee, or as it otherwise designates, such certificates to be subject to no restrictions on transfer. Yale shall concurrently therewith deliver to the Borrower a certified or bank cashier's check in New York Clearing House fund in an amount equal to the amount of the collateral. Until delivery to Yale of the loaned securities, the Borrower shall have all incidents of ownership of the securities including, without limitation, the right to transfer the securities to others; provided, however, that the Borrower shall be obligated to Yale with respect to all rights

to purchase additional stock, and all dividends, interest, and other distribution declared, granted or paid with respect to the loaned securities, as set forth in Paragraph 5 hereof.

4. *Default.* In the event of a default by the Borrower in returning the loaned securities to Yale upon the five business days' notice provided for in Section 3 hereof, or in the event of a default by the Borrower in marking to market as provided in Paragraph 6 hereof, or in paying the amount of any dividend or distribution as provided in Paragraph 5 hereof, or in the event that any proceedings should be commenced by or against the Borrower under the Bankruptcy Act, the Securities Investor Protection Act of 1970 or any other law relating to the liquidation or reorganization of the Borrower or upon the Borrower's suspension from any securities exchange, Yale may, if it so elects by notice to the Borrower, treat the loaned securities as having been purchased by the Borrower. In such event Yale may retain a payment therefor an amount of the collateral equal to the last sales price of the loaned securities prior to such default, the commencement of such proceedings or such suspension, as the case may be, and shall return the excess, if any, to the Borrower, subject to the right of Yale to set off against any such excess any unpaid claim for dividends, interest or other distributions under Paragraph 5 hereof.

If the collateral is less than the market value of the loaned securities at such time, the Borrower shall pay Yale the difference forthwith, together with interest thereon at the rate of eight per cent (8%) per annum until paid.

The Borrower hereby agrees to indemnify and hold Yale harmless from any damages, losses, costs and expenses (including reasonable attorneys' fees) that it may incur or suffer.

5. *Dividends, Distributions, etc.* Yale shall be entitled to receive, to the full extent it would be so entitled if the loaned securities owned by Yale had not been loaned to the Borrower, all distributions made by the issuers of the loaned securities, including cash dividends, stock dividends, interest distributions of any kind declared, granted or made by the issuers or any affiliates thereof and rights to purchase additional securities. Upon payment of any distribution, the Borrower shall forthwith pay that amount whether in cash, stock, or other interests to Yale, notwithstanding that any such distributions were not paid to the Borrower because, as of the relevant record date for such distribution occurring during the period of the loan, the loaned securities had been sold or transferred.

6. *Marking to Market.* In the event that the market value of any loaned securities at the close of trading on a business day is such that the collateral is less than 100% of such market value, Yale may, by notice to the Borrower, demand that the Borrower deposit with Yale an amount in cash (certified or bank cashier's check) which, together with the collateral then on deposit, will equal 100% of the market value, at that time, of the loaned securities. In the event that the aggregate market value of the loaned securities (computed as aforesaid) shall decrease to an amount such that the amount of the collateral then on deposit shall be more than 100% of the market value of the loaned securities, the Borrower may, by notice to Yale, demand that Yale release to the Borrower the excess of the collateral exceeding 100% of the market value of the securities. All demands pursuant to this Paragraph 6 shall be complied with not later than one business day after the receipt of the notice herein provided.

7. *Transfer Taxes and Necessary Costs.* All transfer taxes and necessary costs with respect to the transfer of the loaned securities by Yale to the Borrower and by the Borrower to Yale, upon the termination of the loan, shall be paid by the Borrower. If Yale shall incur any loss by reason of the Borrower's failure to pay all said taxes and costs as may be due by reason thereof, Yale shall be entitled to receive the same from the Borrower and may retain an amount of the collateral sufficient to satisfy its claim against the Borrower in respect of said taxes and costs.

8. *Proxy.* Yale waives the right to vote the securities during the term of this loan.

9. *Use of Securities.* The Borrower warrants that it will not use any of the loaned securities in connection with any illegal transaction or business and will not use or permit anyone to use the loaned securities in such a way as to violate any provision of the securities laws of any state or any of the provisions of the Securities Exchange Act of 1934, the Securities Act of 1933, the rules of the Securities and Exchange Commission, the Regulations of the Board of Governors of the Federal Reserve System, or the constitution, by-laws, rules or policies of any registered stock exchange or of the NASD. The Borrower will indemnify Yale and hold it harmless for any damages, losses, costs and expenses (including reasonable attorneys' fees) arising out of any such illegal transaction, business or purpose by the Borrower or any customer of the Borrower.

10. *Notices:* All notices pursuant hereto shall be in writing and delivered or mailed by registered mail to the party or parties entitled to receive such notices at the following addresses:

IF TO YALE:

Office of Asset Management
Yale University
451 College Street
New Haven, Conn. 06511

IF TO THE BORROWER: Arnold Freilich, Treasurer
Executive Securities Corp.
1 Exchange Place
Jersey City, N.J. 07302

or to such other address as either party may furnish the other party by notice pursuant hereto.

11. *Miscellaneous.* This agreement shall not be assignable by either party without the prior written consent of the other party. Subject to the foregoing, this agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns. This agreement shall not be changed except by an instrument in writing signed by each of the parties hereto.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

YALE UNIVERSITY

By C. H. DOLAB
(the "Borrower")

EXECUTIVE SECURITIES CORP.

By ARNOLD FREILICH

YALE UNIVERSITY EXHIBIT 2

YALE UNIVERSITY New Haven, Connecticut 06520

PATRICK W. MOORE

Associate Comptroller

Executive Securities Corporation
25 Broadway
New York, New York 10004

Gentlemen:

You are party to an agreement with Yale University dated October 15, 1974, pertaining to loans of securities by Yale to you. This agreement requires that for each security loaned by Yale University a receipt be executed (Appendix A). Since Yale University no longer requires a receipt, it is proposed that this requirement be deleted from the agreement. Will you please signify your consent to the following amendments to the agreement by signing and returning to us the copy of this letter enclosed:

1. Paragraph 1 of the agreement shall be amended by striking out the second sentence thereof and inserting in its place the following: "In the event Yale decides to make such a loan, it shall deliver to the Borrower certificates representing the securities loaned, together with duly executed stock transfer powers, whereupon the provisions of this agreement will become effective as to such securities. Yale may from time to time require the Borrower to execute such receipts or other instruments as it deems necessary or desirable to record or document the transaction."

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2. Paragraph 2 of the agreement shall be amended by striking out the second sentence thereof.

Very truly yours,

YALE UNIVERSITY

By P. W. MOORE

The foregoing amendments are agreed to:

EXECUTIVE SECURITIES CORP.

By ARNOLD FREILICH

Dated: 1-10-75

YALE UNIVERSITY EXHIBIT 3

YALE UNIVERSITY New Haven, Connecticut 06520

ASSET MANAGEMENT

451 College Street

February 18, 1975

Executive Securities Corp.
1 Exchange Place
Jersey City, New Jersey 07302

Gentlemen:

We are advised that on Friday, February 14, 1975 the U.S. District Court for the Southern District of New York appointed a trustee for Executive Securities Corp. under the Securities Investor Protection Act. Such action constitutes a default under Paragraph 4 of the Agreement between Executive Securities Corp. and Yale University dated 15 October 1974, pursuant to which Executive Securities Corp. has borrowed from Yale the following securities:

500 shares National Chemsearch Corp.

1000 shares Medtronic, Inc.

6000 shares Anheuser Busch

As collateral for such loan Yale held the sum of \$200,000.

Pursuant to Paragraph 4 of the Agreement Yale has elected to retain such cash and to treat such securities as having been sold to Executive Securities Corp. as of February 14, 1975. Yale hereby further demands payment forthwith of the sum of

\$66,700, being the difference between the amount of such cash and the last sales price of the securities on February 14, 1975.

Very truly yours,

YALE UNIVERSITY

By P. W. MOORE

cc: Cameron F. MacRae III, Esq.

Trustee of Executive Securities Corp.

Messrs. LeBleuf, Lamb, Leiby & MacRae

New York, New York

YALE UNIVERSITY EXHIBIT 4

EXECUTIVES SECURITIES CORP. LOANS

<i>Date</i>	<i>Action</i>	<i>Shares</i>	<i>Security</i>	<i>Collateral</i>	
				<i>Collateral</i>	<i>Balance</i>
10-11-74	Loan	4500	Anheuser Busch	108,000	108,000
10-14-74	MTM	4500	" "	22,500	130,500
11-19-74	MTM	4500	" "	(18,000)	112,500
12-3-74	Loan	1500	Anheuser Busch	1,500	42,000
12-5-74	Loan	500	Nat'l Chemsearch	15,500	15,500
1-31-75	Loan	1000	Medtronics	30,000	30,000

Total Collateral on above loans as of 2-14-75 \$200,000

Market value of loaned securities as of 2-14-75 \$266,700

Purchase price to replace loaned securities on 2-20-75 \$273,788.14

YALE UNIVERSITY EXHIBIT 5

**CAMERON F. MacRAE III, Trustee
for the liquidation of
EXECUTIVE SECURITIES CORP.**

**Post Office Box 95
Wall Street Station
New York, New York 10005**

June 12, 1975

Asset Management
Yale University
451 College Street
New Haven, Connecticut 06520

Dear Sirs:

A review has been made of your letter dated February 18, 1975 addressed to Executive Securities Corp. ("Executive"). Your letter asserts a claim against Executive arising from the loan of securities by Yale University to Executive and has been treated as a formal claim against Executive in liquidation.

This is to notify you that I have determined that institutions lending securities to a broker dealer such as Executive cannot be regarded as "customers" within the meaning of Section 6(c)(2)(A)(ii) of the Securities Investor Protection Act of 1970, and hence are not entitled to the rights accorded "customers" under said Act. Institutions suffering losses from the loan of securities to Executive may nonetheless be general creditors of the estate of Executive and your claim will be considered as a general creditor claim at an appropriate time.

If you do not agree with this determination, however, pursuant to an order entered by the Honorable John J. Galgay, United States Bankruptcy Judge, you must within twenty (20)

days from the date of this notice submit to me (at the address set forth above) and to Judge Galgay (at the United States Court House, Foley Square, New York, New York 10007) a written statement setting forth your basis for opposing the above determination with respect to your claim, together with any and all documents which you believe are relevant to the determination in question.

If you file such a statement of opposition, you will be granted an opportunity to appear in person or by an authorized attorney and present your claim to the court for final adjudication. In such event, you will be notified by mail at a later date of the time and date set by the court for a hearing concerning your claim. If you elect to oppose my determination with respect to your claim, please indicate below that you disagree with such determination.

It is imperative that this letter (and your written statement together with supporting documentation, if you choose to oppose my determination) be returned to me within twenty (20) days. If you fail to do so, upon application my determination of your claim will be confirmed by the court.

Very truly yours,
CAMERON F. MACRAE III,
Trustee

..... I Agree to the above determination.

X I Do Not Agree to the above determination and choose to file a written statement of opposition and present my claim to the court.

Yale University
by s/ John W. Barnett, Its Attorney

7-2-75

.....
Signature of Claimant

.....
Date

YALE UNIVERSITY EXHIBIT 6
BULLETIN OF YALE UNIVERSITY

REPORT OF THE TREASURER
FOR THE FISCAL YEAR 1972-1973

Series 69
1 October 1973
Number 19

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Securities Loan Program.

During the fiscal year 1972-73, the University initiated a securities loan program as a means of increasing current income available for operations.

Brokers often have temporary need for securities, due generally to short sales by customers and inter-broker failures to deliver on time. Brokers who need securities in Yale's portfolio borrow them on a short-term basis, pledging cash equal to the market value of the borrowed securities, and agreeing to remit dividends to Yale. As values change the collateral is increased or decreased. When the need for the securities no longer exists, the broker returns the securities to Yale and the University repays the cash collateral. During the term of the loan, Yale invests the cash collateral in high quality short-term fixed income paper. The University has drafted with the aid of legal counsel an improved form of agreement, and is advised that the plan does not involve substantial risk. Nevertheless, Yale proceeds on a selective basis. As of June 30, 1973 the University had total stock loans outstanding of \$18,737,725.

The net income to current operations from this program was \$0.3 million in the start-up period ending June 30, 1973. For 1973-74 the University budgeted \$0.5 million from this source and has since the budget was approved increased the estimate in view of the sharp summer rise in short-term rates.

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YALE UNIVERSITY EXHIBIT 7

SECURITY LOAN PROGRAM

Analysis of Activity to Earnings Summary of
Activity F/Y to Date as of December 31, 1974

Number of New Loans		1947
Number of Loans Returned		2675
Balance of Loans Outstanding (12-31-74)		20,785,147
Number of Loans Outstanding		236
Estimated Gross Earnings from Short Term Investments		1,216,160
% Gross Earning Rate	11.54	
% Cost Rate	3.41	
% Net Earning Rate	8.13	
LESS:		
Estimated Agent Fees	266,897	
Estimated Bank Fees	92,440	359,337
Estimated Net Income Fiscal Year to Date		856,823
Net Income:		
July	135,382	
August	153,909	
September	124,545	
October	157,832	
November	155,991	
December	129,164	
Cumulative Net Income F/Y to Date		856,823